IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO:

In the matter between:

THE OCCUPIERS OF SARATOGA AVENUE	Applicants
and	
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	First Respondent
BLUE MOONLIGHT PROPERTIES 39 (PTY) LTD	Second Respondent

FOUNDING AFFIDAVIT

I, the undersigned

KATHLEEN HARDY

do hereby make oath and swear that -

1 I am a practicing attorney of the High Court of South Africa, based at the Centre for Applied Legal Studies ("CALS"), West Campus, University of the Witwatersrand, 1 Jan Smuts Avenue, Johannesburg.

2 The facts and allegations contained herein are all within my personal knowledge. They are, to the best of my knowledge and belief, true and correct in all respects.

3 I am the attorney for the applicants in this matter. I am duly authorised to depose to this affidavit on their behalf.

4 The applicants are 100 people who reside at a property situated at 7 Saratoga Avenue, Berea, Johannesburg. Their names and further particulars are set out in annexure "**A**" hereto.

5 The first respondent is the City of Johannesburg, a Metropolitan Municipality, having its headquarters at the Metropolitan Centre, 158 Loveday Street Extension, Braamfontein, Johannesburg.

6 The second respondent is Blue Moonlight Properties, a company having as its registered address 75 Main Road, Diep River, Western Cape.

7 Throughout this affidavit, I shall refer to the applicants as "the occupiers", to the first respondent as "the City" and to the second respondent as "Blue Moonlight". I shall refer to 7 Saratoga Avenue as "the property".

A INTRODUCTION

8 This is an application with two objectives:

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8.1 first, to compel the City to engage meaningfully with the occupiers in order to give effect to the Order of this Court in *City of Johannesburg v Blue Moonlight Properties [2011] ZACC 33* handed down on 1 December 2011 ("the Order"); and

8.2 second, to vary the terms of the Order in certain respects, to avoid the occupiers facing eviction in circumstances where the City has failed to take meaningful steps to provide temporary accommodation as required by the Order, in advance of the date set by the Order for the occupiers to vacate the property or be evicted.

9 For convenience, the Order is annexed hereto and marked "**B**". The Order reads as follows –

"The following is ordered:

(a) The application for leave to appeal is granted.

(b) The appeal is dismissed.

(c) The application for leave to cross-appeal is granted.

(d) The cross-appeal is upheld to the extent set out below.

(e) Paragraphs 5.1 to 5.4 of the order of the Supreme Court of Appeal are set aside and replaced with the following:

(i) The first respondent in the South Gauteng High Court, Johannesburg and all persons occupying through them (collectively, the Occupiers) are evicted from the immovable property situate at Saratoga Avenue, Johannesburg, and described as Portion 1 of Erf 1308, Berea Township, Registration Division IR, Gauteng (the property).

(ii) The Occupiers are ordered to vacate the property by no later than 15 April 2012, failing which the eviction order may be carried out.

(iii) The housing policy of the second respondent in the South Gauteng High Court, Johannesburg, the City of Johannesburg Metropolitan Municipality, is declared unconstitutional to the extent that it excludes the Occupiers and other persons evicted by private property owners from consideration for temporary accommodation in emergency situations.

(iv) The City of Johannesburg Metropolitan Municipality must provide those Occupiers whose names appear in the document entitled "Survey of Occupiers of 7 Saratoga Avenue, Johannesburg" filed on 30 April 2008 with temporary accommodation in a location as near as possible to the area where the property is situated on or before 1 April 2012,

provided that they are still resident at the property and have not voluntarily vacated it.

(f) The applicant is ordered to pay the costs of the first and second respondents, including the costs of two counsel, in this Court."

10 Since the Order was handed down on 1 December 2011, the occupiers' attorneys have been attempting to engage with the City to discuss the implementation of the Order. In particular, we have been anxious to engage with the City on the following issues –

10.1 The accommodation to be provided and its location;

10.2 Exactly who will be provided with accommodation. In ordering the provision of alternative accommodation, this Court relied on a list of the occupiers compiled in April 2008 ("the April 2008 list"). Since the April 2008 list was compiled, some of the occupiers have died or otherwise vacated the property. Other occupiers have got married, had children or have been joined on the property by members of their family. The Supreme Court of Appeal's order (against which the City appealed to this Court) also ordered the City to provide the occupiers with alternative accommodation. It specifically ordered the City to provide alternative accommodation to the occupiers named in the April

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2008 list and to those persons "*occupying through them.*" This Court's order provides that the occupiers *"and all persons occupying through them"* are to be evicted from the property but then provides that *"those persons whose names appear in the [April 2008 list]"* are to be provided with alternative accommodation. The occupiers' attorneys accordingly sought an assurance from the City that the family members of the persons named in the April 2008 list would be included in the provision of alternative accommodation.

10.3 Whether the occupiers will be permitted to reside in family accommodation. The City has recently adopted a practice of providing people evicted from properties in the inner city of Johannesburg with gender-differentiated, dormitory-type accommodation ("dormitory accommodation"). In dormitory accommodation, men sleep in barrack-like conditions in a large open space on one floor of a building, and women sleep together in an open space on another floor of a building. There is no attempt to cater for children, or households who wish to reside together in a single room. Given that almost all of the occupiers currently live with their families, I have sought an assurance on behalf of the occupiers that individual families will be accommodated together. I have emphasised to the City that

the occupiers do not seek particularly extensive provision in this regard: it would be enough for the occupiers if they were permitted to live with their families in a single room.

11 To date, the City has not responded to any of the above queries, or given the assurances I have sought on behalf of the occupiers. It has, in fact, ignored virtually all of the correspondence sent to it. The City has instead embarked upon a process to "register" the occupiers. While the City has never made the purpose of such registration entirely clear, I and the occupiers had assumed that the purpose of the registration process was to place the occupiers in alternative accommodation.

12 However, on 2 March 2012, Ms Elsie Naidoo of the City's Legal Services Department, informed me that the registration process has nothing to do with the provision of housing and that the occupiers' registration "*does not in any way consist in a housing application*".

13 Accordingly, there is no outward sign that the City has made any effort to comply with the Order. While I have been in communication with the City and its legal representatives, they have steadfastly refused to provide any meaningful information on the steps the City is taking to comply with the Order.

14 The Order requires that the occupiers must vacate their homes on or before 15 April 2012. Given the lack of any meaningful engagement or

information from the City on the steps it has taken and will take in future to comply with the Order, the occupiers have a well-grounded fear that no or insufficient steps are being taken to provide them with accommodation.

15 I respectfully submit that the occupiers cannot simply sit back and wait until the City has not complied, or has complied inadequately, with the Order. The relocation of a large number of people is inevitably a complex and stressful process which requires careful planning and engagement. At the time of the drafting of these papers, less than one month before the relocation is due to take place, the City has not even identified where the accommodation will be. Nor has it responded to the concerns raised by the occupiers set out above.

16 It is respectfully submitted that the City's conduct in this regard is both unreasonable and unlawful. Section 26(2) of the Constitution requires that every step the City takes in the provision of housing – including the provision of temporary accommodation in terms of a court order – must be reasonable. Moreover, such steps must be taken in terms of a process of meaningful engagement with the occupiers. This is required not only in terms of section 26(2) of the Constitution but also in terms of the provisions of the Housing Act 107 of 1997 and the Emergency Housing Policy. The City's virtual silence with regard to the steps it may be taking to implement the Order is inconsistent with its obligations in

terms of these instruments and – it is respectfully submitted – grossly unreasonable.

17 The urgency of this case is manifest. The burden of any non-compliance with the Order will fall on the occupiers, as they must vacate the property by 15 April 2012, failing which they are to be evicted. If the City has not complied with its obligations by then, or complies half-heartedly or inadequately the occupiers are at real risk of homelessness and the violation of other of their fundamental rights – including the right to dignity, the right to freedom and security of the person and the right to life. Compliance with an order to provide alternative accommodation to a large number of people is a complex and programmatic process. If, as the occupiers fear, no or inadequate steps have been taken to comply with the Order order, it will simply be too late to remedy the situation if the occupiers do not approach this Court now.

18 The remainder of this affidavit will be structured as follows –

18.1 First, I will set out the steps I have taken to engage with the City, on behalf of the occupiers, in relation to the implementation of the Order.

18.2 Second, I will set out the issues arising from the registration process commenced by the City.

18.3 Third, I will deal with the relief sought by the occupiers in this application.

18.4 Fourth, and finally, I will deal with the issue of urgency.

B EFFORTS TO ENGAGE THE CITY

19 The Order was handed down by this Court on 1 December 2011.

20 On 15 December 2011, Morgan Courtenay, an attorney based at CALS, who was at that time representing the occupiers, wrote to the attorneys for the City, Messers Moodie and Robertson. His letter is annexure "**C**" hereto.

21 In his letter, Mr. Courtenay stated that –

21.1 The occupiers had yet to hear the City's proposals on how it intended to comply with the Order;

21.2 A meeting to discuss compliance with the Order ought to be convened during the week of 23 January 2012;

21.3 The occupiers would require shelter where they could live in privacy and dignity with their families, with access to water, sanitation and electricity for cooking heating and lighting;

21.4 The occupiers would in principle accept accommodation similar to that provided to CALS clients in *Occupiers of 51 Olivia Road, Berea and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).

21.5 Gender differentiated dormitory accommodation would be neither suitable nor acceptable to the occupiers.

22 The City did not agree to the proposed meeting. Instead, on 30 January 2012, the City's attorneys wrote to me, stating the following –

"It is our client's intention to register your clients arising out of the Blue Moonlight Judgment and as a precursor to fulfilling the requirements of the Judgment. The registration process is not simply a paper process: it is a digital registration process capturing fingerprints, photographs and a full social assistance profile. It appears that your clients will have to attend at the CJ Cronje Building in Loveday Street or at Thuso House in Braamfontein.

Please advise when in the near future you may be available to attend, or have someone attend such process? Kindly provide us with two dates later this week or possibly early next week. We will subsequently advise what documentation your clients will need to provide."

23 That letter is annexure "**D**" hereto.

24 On 1 February 2012, and having taken instructions from the occupiers, I replied to the City's letter. My reply is annexure "**E**" hereto. In my reply I stated that –

24.1 The occupiers have no objection to a registration process, but would need to know what information is required of them in order to register.

24.2 The occupiers are, at the outset of the process, entitled to know –

24.2.1 whether alternative accommodation has been identified for their relocation, and if so on what terms; and

24.2.2 If no alternative accommodation has been identified, what steps are being taken to provide such accommodation and when those steps will be taken.

24.3 I furthermore recorded that no response had been received to the occupiers' queries regarding whether family groups would

be entitled to live together in any alternative accommodation to be provided.

24.4 Finally, I reiterated the occupiers' view that it would be appropriate for the parties and their representatives to meet to discuss the process to be followed in complying with the Order and asked the City's attorneys to indicate when they would be available for such a meeting.

25 The City's attorneys did not respond to that letter for a further two weeks. Nor was any process of registration commenced. On 15 February 2012, I received a letter in which it was stated that the City was unable to confirm when the registration process would take place, but that the process would track "*income, number of dependents, age, disability and a skills profile*". That letter is annexure "**F**" hereto.

26 Accordingly a full two-and-half months after this Court had made its Order, the City had not –

26.1 identified alternative accommodation, or, if it had, did not make this known to the occupiers;

26.2 met with the occupiers or their legal representatives; or

26.3 registered the occupiers in line with its stated intention to do so.

27 On 16 February 2012, I addressed a further letter to the City. That letter is annexure "**G**" hereto. In it, I placed on record that the City's casual attitude to the implementation of the Order and its lack of response to the occupiers' queries and concerns was unacceptable and unreasonable. I stated that this application would be instituted if the occupiers were not provided with the following information by 29 February 2012 –

27.1 details of the registration process, including all information and documentation required of the occupiers, as well as the time and place at which it must be provided;

27.2 an indication of whether alternative accommodation has been identified;

27.3 if alternative accommodation has been identified, an indication of its nature and location and whether the occupiers will be permitted to live in family units there; and

27.4 if alternative accommodation has not been identified, what steps have been taken and will be taken in future to identify such accommodation.

28 A full week later, on the afternoon of Thursday 23 February 2012, I was telephoned by the City's attorneys and was told that the occupiers would be required to make themselves available to register at the City's offices on 26 February 2012. Despite this constituting barely two days' notice, I ensured that 75 of the occupiers presented themselves for registration on 26 February 2012.

C THE REGISTRATION PROCESS

29 During the course of engaging with the occupiers and preparing them for registration and relocation, it has become apparent that –

29.1 the April 2008 list did not fully record the number of people living on the property. It erroneously excluded a number of people who were residing at the property together with persons named on the list;

29.2 since the list was compiled, a number of people named on it have got married, had children and been joined at the property by members of their family; and

29.3 a number of people whose names were included in the April 2008 list have died or otherwise vacated the property.

30 There were 86 people on the April 2008 list. After the changes in the occupiers' profile set out above are taken into account, there are 100 people now resident on the property and in need of alternative accommodation. The additional occupiers are all family members of those named on the April 2008 list. Either they were excluded from the April 2008 list in error when it was compiled or they have joined family members named on the April 2008 list in the three years between the list being compiled and the order of this Court being handed down. A list of all of the people whose names appear on the April 2008 list, together with all of the people currently resident at the property whose names do not appear on the April 2008 list is annexed hereto and marked "**H**". Those persons who appear on the April 2008 list who are still resident at the property are marked "Y". Those who have died or vacated the property since April 2008 are marked "N". Those in the column headed *"occupying through"* are people who were either excluded from the April 2008 list in error or who joined a family member on the property since the April 2008 list was compiled. The relevant familial relationship is set out in the last column entitled *"link relationship."*

31 At the registration process held on 26 February 2012, the changes in the occupiers' profile were brought to the City's attention. Mr Jak Kossef, the City's Director of Social Development, was informed that certain of the people seeking to register for temporary housing were not included on

the April 2008 list, but were family members residing with people who are named on the list. Mr. Kossef confirmed that these people would nonetheless be registered and their details would be forwarded to the City's Department of Housing. This is confirmed by Osmond Mngomezulu, an attorney practicing at the Socio-economic Rights Institute of South Africa (SERI) who assisted the occupiers at the registration process held on 26 February, and was present when Mr. Kossef made this undertaking. Mr. Mngomezulu's confirmatory affidavit in this regard is annexure "**I**" hereto.

32 On being informed of this, I was re-assured that the City's intention was to provide all of the present occupiers of the property with alternative accommodation – at least insofar as it was confirmed that they were family members of and resided with people named on the April 2008 list.

33 However, at 13h37 on 28 February 2012, I received an email from Ms Elsie Naidoo of the City's Legal Services Department which stated that people would be registered only "as per court order". Ms. Naidoo's e-mail is annexure "**J**" hereto.

34 I responded to the message at 16h52 on the same day, stating that the occupiers had registered with the City on the basis that everyone on the April 2008 list, together with all those occupying through them (including, for example, spouses, children and other relatives who had moved onto the property since April 2008) would be accommodated. I also re-iterated

that there was still no clarity on when, or if, the City would comply with the order of this Court to provide alternative accommodation by 1 April 2012. My e-mail in this regard is annexed hereto and marked "**K**".

35 At 14h13 on 29 February 2012, Ms. Naidoo sent an e-mail in which she recorded that participation in the registration process "*is not to be construed as an undertaking*" that the occupiers will be provided with alternative accommodation. Ms. Naidoo's e-mail in this regard is annexure "**L**" hereto.

36 On 14h55 on 1 March 2012, I wrote again to Ms Naidoo. My e-mail stated, *inter alia*, that, whether or not there was an undertaking, the Constitutional Court order would clearly have envisaged that family and household members of people named on the April 2008 list would be provided with alternative accommodation. This is corroborated by the fact that the Supreme Court of Appeal ordered the persons not on the April 2008 list who occupy "*through*"" persons on the list should also be accommodated. The order of the SCA is attached hereto and marked "**M**".

37 At 10h30 on 2 March 2012, I received a further message from Ms Naidoo, which is annexed hereto and marked "**N**". It stated that –

"*I re-iterate this process is only to assist the "occupiers" who are allegedly in need of social assistance, thereby enabling their details to be*

electronically captured. It does not in any way consist in a housing application" (underlining added)

38 This email does not engage at all with the issues relating to the lists of occupiers set out above. It furthermore indicates that the registration process has nothing to do with the provision of housing to the occupiers after all.

39 Accordingly, a full three months after this Court made its Order, there is no outward sign that the City is doing anything to comply with it. Instead, it has misled the occupiers and their legal representatives by embarking on a registration process which it now says has nothing to do with the provision of housing. It now appears that the registration process is a sham, meant to fob the occupiers off while the City does nothing to comply with the Order.

40 Accordingly, at present, there is no indication that the City has identified alternative accommodation for the occupiers. Nor has there been any engagement with the occupiers on the location of the accommodation to be provided or its nature, including but not limited to the needs of families who desire to live together in family accommodation.

41 The occupiers are unable to obtain alternative accommodation on their own since despite ongoing efforts by them to locate alternate housing, they have found that there is nothing that is available and affordable to

them. This is confirmed in the accompanying affidavit of Bhekane Koketi attached hereto as Annexure **"O"** which confirms on behalf of all the occupiers that the facts relating to the absence of alternative accommodation set out in the affidavits filed of record in this matter are still in existence. The affidavit of Bhekane Koketi also confirms the correctness of the further facts in this affidavit insofar as they pertain to the occupiers.

D THE RELIEF SOUGHT IN THIS APPLICATION

42 This Court has held that housing policies must not only be formulated reasonably: they must also be implemented reasonably. It is respectfully submitted that this principle is equally applicable to the provision of housing in terms of a court order. The duty on the City to act reasonably in terms of section 26(2) of the Constitution includes the duty to engage meaningfully with the occupiers and their legal representatives. This requires the City to be open about the steps it is taking to comply with the Order and to supply the occupiers and their legal representatives with the information they require to participate meaningfully in the process. It is respectfully submitted that information relating to the location and the nature of the accommodation to be provided is fundamental in this regard.

43 The duties to act reasonably and engage meaningfully arising out of section 26(2) of the Constitution are reflected in and given effect to in the provisions of the Housing Act and the Emergency Housing Policy.

44 Section 3 (4) (g) of the Housing Act 107 of 1997 provides for a National Housing Code ("the Code"). Volume 4, part 2 of the Code is the Emergency Housing Programme ("the Emergency Programme"). I respectfully submit that the provisions of the Programme are binding on all municipalities undertaking emergency housing projects, including relocations consequent upon evictions.

45 The City is accordingly bound by the Emergency Programme and must observe its requirements.

46 Annexure D of the Emergency Programme is entitled "General Procedures on Local Project Co-ordination" ("the General Procedures"). The General Procedures constitute guidelines on the process to be adopted by the City implementing a resettlement or relocation project. The General Procedures set out the following steps to be taken in the implementation of a relocation or resettlement project such as the present –

46.1 Step 1: A local level steering committee must be formed. It must include representatives of the persons and families who are to be resettled. The steering committee is responsible for

"*communication, negotiation and local decision-making pertaining to all aspects relating to the emergency housing programme*".

46.2 Step 2: The local level steering committee and the municipality must *inter alia* ensure that any conflicts arising from the implementation of the project must be addressed, where appropriate through "*a process of mediation and conflict resolution*".

46.3 Step 3: At this stage, the local level steering committee must "*ascertain and assess all available options relating to available land*". It must then "*ensure consensus about all the terms and conditions relations to the emergency housing situation*".

46.4 Step 4: The municipality concerned then develops a detailed project plan to facilitate the resettlement process. The plan must be approved by the municipality and accepted by "*other stakeholders*". Crucially, the contents of the plan must be communicated "*to individual affected persons/families and to other parties affected*". (underlining added).

46.5 Step 5: At this point, a register of beneficiaries must be compiled.

46.6 Step 6: Occupancy and rental agreements, if appropriate, must be entered into.

46.7 Step 7: Only at this stage is the physical relocation of a community undertaken. I emphasise that this is only after the contents of the relocation plan have been communicated to the affected persons and families and consensus has been achieved in terms of Step 4 above.

46.8 Step 8: At this stage, a process of aftercare is implemented, including the commencement of a process aimed at "*achieving a permanent housing solution in due course*".

47 A copy of the General Procedures is annexed hereto and marked **"P."**

48 There is no indication that the City has followed any of these steps. The General Procedures envisage a process of consultation between the City and the occupiers, leading to the implementation of a consensual relocation. Moreover, the General Procedures clearly envisage that the complex and stressful process of relocation will be undertaken in an open, transparent and inclusive manner. It is respectfully submitted that the occupiers are entitled to such a process.

49 The occupiers accordingly seek an order compelling the City to forthwith engage meaningfully with them on the location and nature of the

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temporary accommodation to be provided to them as well as the details of the process of their relocation. The effect of the City's failure to commence engagement with the occupiers means that their relocation cannot now be effected by 1 April 2012 as ordered by this Court. The occupiers accordingly seek to extend the relocation date and the eviction date stipulated in this Court's Order by a period of two months as set out in their Notice of Motion.

50 The changes in the occupiers' profile and the City's attitude thereto has been set out above. If, as appears to be its intention, the City insists that only those people whose names appear on the April 2008 list will be given alternative accommodation, families will be torn apart, as one family member will be given alternative accommodation while another will be evicted onto the streets. For example –

50.1 Sipho Ndulini, who has lived on the property for over 20 years, will be provided with alternative accommodation. His daughter, Bongeka, who lives with him, will be evicted.

50.2 Jumaima Radebe will be provided with alternative accommodation. Her daughter, Mlamuli, who lives with her, will be evicted.

50.3 Lindiwe Zuma will be provided with alternative accommodation. Her son, Wonderboy, who lives with her, will be evicted.

50.4 Nkosinathi Goge will be provided with alternative accommodation. His brother, Mfano, who lives with him, will be evicted.

51 It is respectfully submitted that these absurd results could never have been intended by this Court when it made its Order and that paragraph 104(e)(iv) thereof ought therefore to be varied to include persons *"occupying through"* the persons whose names are stipulated in the April 2008 list.

E URGENCY

52 I now address this issue of urgency. It is respectfully submitted that this application is urgent because –

52.1 The occupiers and their legal representatives have been attempting to engage with the City for 3 months on what steps it is taking to implement this Court's Order. The City has provided no meaningful response. Instead, the City has insisted that the occupiers embark upon a registration process which turned out to have nothing to do with the provision of housing. Not only has the City been overwhelmingly non-responsive but when it has

engaged with the occupiers, it has done so in a manner which is materially misleading.

52.2 The occupiers accordingly have a well-grounded fear that the City has done nothing to implement the court order and will not be in a position to make accommodation available to them on 1 April 2012. The occupiers dare not wait until the City is in breach of the court order before taking action to enforce it. This is because the burden of the City's non-compliance with the Order falls squarely on the occupiers, who are subject to an eviction order. If the City is not ordered to comply with its obligations now, in terms of the extended time limits sought in the Notice of Motion, then the occupiers will be in real danger of being evicted without the provision of alternative accommodation on 15 April 2012. That would leave the occupiers homeless, expose them to the violation of a number of their fundamental rights and completely subvert the Order of this Court.

F CONCLUSION

53 It is respectfully submitted that the City's conduct set out above warrants a punitive costs order against it. The occupiers accordingly seek an order

requiring the City to pay the costs of this application on the attorney and client scale.

54 Having regard to all of the above, I respectfully submit that the occupiers are entitled to an order in terms of the Notice of Motion to which this affidavit is attached.

KATHLEEN HARDY

The Deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at HILLBROW on this the 8 day of MARCH 2012, the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended and Government Notice No. R 1648 of 17 August 1977, as amended having been complied with.

COMMISSIONER OF OATHS

SUID-AFRIKAANSE POLISIEDIENS
STATION COMMISSIONER
D - SHIFT
08 MAR 2012
CLIENT SERVICE CENTRE
HILLBROW
SOUTH AFRICAN POLICE SERVICE